Filed 11/2/20 In re J.T. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re J.T., et al., Persons Coming Under the Juvenile Court Law.	B304449
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. B.S., Defendant and Appellant.	(Los Angeles County Super. Ct. No. 19CCJP08020)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip L. Soto, Judge. Reversed.

Christopher R. Booth, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kim Nemoy, Assistant County Counsel, and Tracey Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

B.S. (Mother) appeals from a jurisdiction order declaring her children, J.T. and S.M., to be dependent children of the court. Mother asserts the evidence was insufficient to establish the children are persons described by Welfare and Institutions Code[1] section 300, subdivision (b)(1). Mother does not challenge the disposition.

We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Petition*

On December 16, 2019, the Los Angeles County Department of Children and Family Services (DCFS) filed a section 300 petition on behalf of J.T. (born in 2014) and S.M. (born in 2019). The petition alleged that the children came within the juvenile court's jurisdiction because they had suffered, or were at substantial risk of suffering, serious physical harm "as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child" and "by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." (See § 300, subd. (b)(1).)

Mother was initially arrested and charged with child cruelty and driving under the influence under Penal Code section 273a, subdivision (a) and Vehicle Code section 23152, subdivision (a), but the district attorney declined to press charges.

---

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

B. *DCFS Reports*

1. *Detention Report*

In its detention report, DCFS stated that, on December 2, 2019, Mother drove under the influence of alcohol with the children in the car for the purpose of putting up "Christmas lights" at 1:40 a.m. Mother and the children were involved in a solo vehicle accident on the freeway. A good Samaritan stopped to assist Mother after the accident, but was struck and killed by a passing vehicle. Mother was also struck by the passing vehicle and suffered injuries to her right leg. The children were physically unharmed but J.T. witnessed both the good Samaritan and his mother get hit and suffered emotional trauma.

According to the preliminary traffic collision report, Mother told law enforcement that she was driving when the steering wheel locked, causing her to hit a wall. The responding officer examined the steering wheel and was able to move it from left to right without issue. Mother did not have a valid driver's license at the time of the accident.

The responding officer noted Mother had alcohol on her breath, and was disoriented and stumbled around while holding S.M. in her arms. The officer instructed Mother to hand the children over to another officer, who transported them off the freeway and released them to the father of S.M., A.M. (Father).[2]

Mother admitted to law enforcement that she had consumed one alcoholic drink. At the scene of the accident, Mother took two breathalyzer tests, registering blood alcohol levels of 0.079% at 2:58 a.m. and 0.085% at 3:05 a.m.

---

[2] The whereabouts of J.T.'s biological father were unknown and Mother co-parented both children with Father.

A social worker from DCFS interviewed Mother while she was in custody. Mother admitted to drinking one shot of brandy prior to driving. Mother claimed that she was celebrating having been in her apartment for two years, and left her house at 1:40 in the morning with her two children to pick up Father to put up Christmas lights. She stated she hit the concrete wall because her steering wheel locked up, and not because she was under the influence of alcohol. Mother denied having any substance abuse issues or mental health issues. She denied having any domestic violence or sexual abuse issues in her home and kept no weapons there. She denied engaging in any inappropriate discipline. Mother did not appear to be under the influence of alcohol or drugs and engaged with the social worker in an intelligible conversation. Mother stated that she "grew up in the system" and had a "horrible experience" in foster care. She did not want her children to suffer the same hardship.

At the December 17, 2019 detention hearing, the court removed the children from Mother and ordered that they remain in the care of Father.

2. *Jurisdiction/Disposition Report*

A social worker interviewed Mother at home and, when asked about the allegation that she placed her children at risk by driving under the influence of alcohol, Mother replied that she had only "one shot" prior to the accident and was not "totally intoxicated." She explained her "tires were low [and she] hit the wall." She stated the criminal charges against her were dropped.

Mother told the social worker she received weekly individual counseling services. Mother's counselor confirmed Mother's participation in therapy and opined that, based on regular contact, the counselor did not believe Mother had

a substance abuse issue. The counselor later wrote to DCFS to explain that Mother would be working on self-care, stress management, identifying warning signs, setting boundaries, and understanding healthy relationships. Mother had, by that time, attended 18 counseling sessions, and "continue[d] to do well, to understand each session, and [was] motivated to change."

DCFS recommended that the children remain with Father, and that Mother receive family reunification services. DCFS requested that Mother participate in individual counseling and parenting classes, as well as be subject to random drug testing.

In a last minute information, DCFS reported that Mother had twice tested clean for drugs and alcohol.

C. *Jurisdiction and Disposition Hearing*

Mother testified at the adjudication hearing that she had had one "shot" two and a half hours before getting in the car. She demonstrated that the size of the shot was about four inches and was sold as a double shot. Mother testified that she usually did not drink, and it had been a year since her last drink prior to the night of the accident. She had not had a drink since that night.

Mother further testified that she left the house because Father called and asked her to pick him up. They had errands to run the following day and it was convenient for her to stay at Father's home so she could observe J.T. in his first grade class.

Mother stated that she had only been driving for seven months. She explained that the car accident happened because the "wheel got stuck, . . . and [she] couldn't turn anymore," and her tire, which needed to be "changed that day," "busted."

Mother testified that she understood she placed her children at risk of harm by driving under the influence, and felt

she could safely consume "zero" drinks before getting behind the wheel in the future.

In rendering its decision, the court told Mother that this was a case of "extremely poor judgment," but recognized Mother did not have "a very long history of this." Nonetheless, the court found that, while "there wasn't a history before," the court could not "just dismiss this case and hope against hope that [Mother was] telling . . . the truth, and [Mother was] not going to do something like this again. [The court doesn't] rely on hope[,] not when children's lives are at stake." The court then found the section 300 petition to be true.

With regard to disposition, the juvenile court found the children to be dependents of the court but returned them to Mother. Among other things, the court ordered Mother to participate in random or on demand drug and alcohol testing, and further ordered her to complete a full rehabilitation program if any of the tests were positive.

Mother timely appealed the order.

DISCUSSION

Mother challenges the juvenile court's jurisdictional findings on the ground they were unsupported by substantial evidence.

Section 300, subdivision (b)(1) provides in pertinent part: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's . . . substance abuse. . . . The child shall continue to be a dependent child pursuant to this

subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness."

" 'The three elements for jurisdiction under section 300, subdivision (b) are: " '(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) "serious physical harm or illness" to the [child], or a "substantial risk" of such harm or illness.' " [Citation.] "The third element, however, effectively requires a showing that *at the time of the jurisdictional hearing* the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur)." ' [Citation.] Evidence of past conduct may be probative of current conditions. [Citation.] To establish a defined risk of harm at the time of the hearing, there 'must be some reason beyond mere speculation to believe the alleged conduct will recur. [Citation.]' [Citation.]" (*In re D.L.* (2018) 22 Cal.App.5th 1142, 1146.)

At the jurisdiction hearing, "[p]roof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300." (§ 355, subd. (a).) "We will uphold the juvenile court's [jurisdictional] findings if after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is substantial evidence to support the findings." (*In re Monique T.* (1992) 2 Cal.App.4th 1372, 1378.) "Substantial evidence is evidence that is reasonable, credible, and of solid value." (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)

The question in this case is whether evidence of a single episode of a parent driving under the influence with her children in the vehicle is sufficient to bring the children within the

juvenile court's jurisdiction. "The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances." (*In re J.N.*, *supra*, 181 Cal.App.4th at pp. 1025–1026.) Under such circumstances, however, there must be something more than mere speculation to support such future substantial risk. "In evaluating risk based upon a single episode of endangering conduct, a juvenile court should consider the nature of the conduct and all surrounding circumstances, which might include, among other things, evidence of the parent's current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim." (*Ibid.*)

In re J.N. applied this analysis to a jurisdictional finding based on a single instance of the mother and the father driving home from a restaurant while severely intoxicated and with their three children in the car. (*In re J.N., supra*, 181 Cal.App.4th at pp. 1015–1017.) While driving, the father struck another vehicle and then sped away from the scene, only to lose control and crash into a traffic signal pole. (*Ibid.*) The children, two of whom were injured in the collision, were taken from the vehicle by the father, who attempted to flee the scene with them. (*Ibid.*) Both the father and the mother were agitated and uncooperative at the scene. (*Ibid.*) The father appeared too intoxicated to take a field sobriety test and could not follow directions for a preliminary screening breath test. (*Ibid.*) Blood tests showed his blood alcohol level to be .20. (*Ibid.*) The court found this single incident did not support a finding of dependency under section 300, subdivision (b)(1), because there was nothing on

which the juvenile court could have based a finding of current or future risk to the children. There was no evidence that either parent's parenting skills, judgment, or understanding of the risks of inappropriate use of alcohol was "so materially deficient that the parent is unable 'to adequately supervise or protect' the children." (*In re J.N.*, *supra*, at p. 1026.) The evidence indicated that the children were healthy, well adjusted, and developing appropriately. Both parents were remorseful, loving, and indicated a willingness to learn from their mistakes. (*Ibid.*)

In *In re M.R.* (2017) 8 Cal.App.5th 101, by contrast, our colleagues in Division Five concluded that there existed " ' " 'some reason to believe' " ' " such a risk existed following an incident in which the parents drove drunk with their children in the car. The parents in *In re M.R.*, unlike those in *In re J.N.*, minimized the mother's intoxication (maintaining she had consumed just one or two beers despite evidence of significant intoxication) and denied the need for DCFS involvement or services. (*Id.* at p. 109.) The court found the parents' minimization of their culpability, as well as mother's failure to participate in alcohol education programs, "call[ed] into question [the parents'] general judgment." (*Ibid.*; see also *In re Gabriel K.* (2012) 203 Cal.App.4th 188, 197.)

Like the parents in *In re J.N.* and unlike the parents in *In re M.R.*, Mother has fully recognized the seriousness of her actions, and is dutifully participating in services. DCFS presented no evidence Mother has a history of substance abuse. Indeed, the court recognized Mother did not "have a very long history of this. In fact, I've gone through the records, and as far as I can tell, the only history you had for an arrest was from this night [that gave rise to the petition] when you were arrested for

DUI and child cruelty. And I haven't seen anything from [DCFS] from any of the documents or witnesses that there's a history of doing this."

Like in *In re J.N.*, there was no evidence, such as expert opinion, from which to reasonably infer that a person who drank as Mother did, exhibited her symptoms and behavior, and had her blood alcohol level on a single occasion were likely to have an ongoing substance abuse problem. The evidence did not even establish that Mother consumed alcohol on a regular basis. (Cf. *In re James R.* (2009) 176 Cal.App.4th 129, 137 ["Although there was some evidence [the mother] drank beer, the record does not show she was regularly intoxicated, rendering her incapable of providing regular care for the minors or posing a risk to them. The mere possibility of alcohol abuse, coupled with the absence of causation, is insufficient to support a finding the minors are at risk of harm within the meaning of section 300, subdivision (b)"], abrogated on other grounds by *In re R.T.* (2017) 3 Cal.5th 622, 628.)

While it is a valid concern that Mother blamed the mechanical failure of the car for the accident, she never denied that she had made the terrible decision to drive while intoxicated with her children in the car, took responsibility for doing so, and showed remorse for her conduct and a willingness to learn from her mistakes. Additionally, by the time of the adjudication hearing, Mother had tested negatively for alcohol or drugs twice in a row and had participated in 18 weekly counseling sessions. As in *In re J.N.*, there is thus nothing on which the juvenile court could conclude that Mother continues to pose a danger to her children.

DCFS attempts to distinguish *In re J.N.*, pointing out that the parents in *In re J.N.* were at a restaurant at the time they consumed alcohol, while Mother drank at home and then roused her children at 1:40 in the morning to drive to Father's. We are not persuaded by the implied distinction that the facts of *In re J.N.* were less egregious because the parents in that case needed to get their children home from the restaurant, while Mother's acts were "incomprehensible" because she left the comparative safety of home in the middle of the night. DCFS's focus is on each parent's conduct only on the respective nights in question. However, we must have a basis to conclude there is a substantial risk the parent's endangering behavior will recur in the future. (*In re D.L.*, *supra*, 22 Cal.App.5th at p. 1146.) Here, as in *In re J.N.*, support for such future risk is lacking.

While we are not minimizing the profound risk Mother exposed her children to on the one occasion in this case, there was no evidence from which to infer "question[able] . . . general judgment" on the part of the parents or a substantial risk such behavior will recur. (*In re M.R.*, *supra*, 8 Cal.App.5th at p. 109; *In re Gabriel K.*, *supra*, 203 Cal.App.4th at p. 197 ["[o]ne cannot correct a problem one fails to acknowledge"].) But with no indicators of future risk, the evidence was not sufficient to establish that J.T. and S.M. were at substantial risk of serious physical injury as the result of parental inability to adequately supervise or protect them. The evidence did not support a finding that each child was within the jurisdiction of the juvenile court under section 300, subdivision (b)(1).

DISPOSITION

The judgment of the juvenile court is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

BENDIX, J.

SINANIAN, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.